

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

RICHARD G. BOWLING	:	APPEAL NOS. C-070377
		C-070378
and	:	C-070387
BRENDA BOWLING,	:	TRIAL NO. A-0507272
Plaintiffs-Appellees,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
GORDON REAL ESTATE, LLC,	:	
D & M ENTERPRISES, INC.,	:	
DON STAFFORD AND MICHAEL	:	
WATTERS, d/b/a D & M	:	
ENTERPRISES,	:	
MAC ROBINSON,	:	
DONALD STAFFORD,	:	
MICHAEL WATTERS,	:	
CONTINENTAL JEWELERS, INC.,	:	
and	:	
ADAMAS RESEARCH COMPANY,	:	
INC.,	:	
Defendants-Appellants.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

These consolidated appeals result from a lawsuit that the plaintiffs-appellees, Richard and Brenda Bowling, filed during the development of land located downslope from their adjoining property in the Columbia Tusculum section of Cincinnati. The Bowlings sued multiple parties including Gordon Real Estate, LLC; D&M Enterprises, Inc.; Don Stafford and Michael Watters d/b/a D&M Enterprises; Mac Robinson; Donald Stafford; Michael Watters; Continental Jewelers, Inc., and Adamas Research Co., Inc.

The Bowlings alleged that Gordon had negligently planned and overseen the development, and that D&M Enterprises, Inc., Stafford and Watters, and Robinson had negligently constructed the development. They further alleged that the negligence had caused soil slippage that had damaged their land and house and would continue to do so. The trial court granted summary judgment for the Bowlings against all the defendants on the issue of liability in October 2006. After a hearing in May 2007, the court awarded monetary damages and injunctive relief and ordered the construction of a pier wall on the property line. And the court imposed sanctions against the defendants and the law firm representing the defendants, Stafford and Stafford, Co, L.P.A. (“the Stafford law firm”), jointly and severably. The defendants and the Stafford law firm now appeal.

Donald Stafford has recently filed for bankruptcy, staying the appellate proceedings as to him individually and doing business as D & M Enterprises. We limit our review to the other defendants, who we refer to collectively as “the Stafford defendants.”

We first address the Stafford defendants’ assignment of error challenging summary judgment. The Bowlings contend that we lack jurisdiction to review this

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

assigned error because the Stafford defendants did not list the October 2006 summary-judgment order in the notice of appeal or attach the order to the notice.

We reject the Bowlings' contention that jurisdiction is lacking. The order that determined liability but not damages was interlocutory and did not constitute a final order as contemplated by R.C. 2505.02.² Thus, the Stafford defendants invoked this court's jurisdiction to review the summary-judgment order by timely appealing from the final judgment that awarded damages.³

That said, this court may impose sanctions, including dismissal, when an appellant fails to designate in the notice of appeal the part of the judgment appealed, as required by App.R. 3(D), and when this failure causes prejudice.⁴ In this case, the Stafford defendants have assigned as error the granting of summary judgment. Where the Bowlings have had notice of the challenge and ample opportunity to respond, we conclude that the Bowlings have not been prejudiced by the lack of specificity in the notice of appeal.⁵ Accordingly, we address the merits of the assignment of error challenging summary judgment.

The party moving for summary judgment has the burden to establish that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law.⁶ The Stafford defendants argue that the Bowlings did not meet their burden with regard to causation and the liability of each defendant. After our de novo review, we agree.

Central to the Bowlings' pleaded claims was that the parties responsible for the development had proceeded before installing a wall to shore up the hillside and that, as a result, the soil had slipped and caused damage to their land and house.

² See *Walter v. Allstate Ins. Co.*, 9th Dist. No. 21032, 2002-Ohio-5775, at ¶10-11, citing *State ex rel. White v. Cuyahoga Metro. Hous. Auth.* (1997), 79 Ohio St.3d 543, 546, 684 N.E.2d 72.

³ App.R. 3(A); *Transamerica Ins. Co. v. Nolan* (1995), 72 Ohio St.3d 320, 649 N.E.2d 1229, syllabus.

⁴ *Transamerica*, supra; *Maritime Mfrs., Inc. v. Hi-Skipper Marina* (1982), 70 Ohio St.2d 257, 259, 436 N.E.2d 1034.

⁵ See *Transamerica* at 322; *Maritime Mfrs.* at 259-260.

In support of summary judgment, the Bowlings submitted the affidavit of Francis Krieger, P.E., P.S., an expert in geotechnical engineering. Krieger opined, on December 13, 2005, that the Bowlings' soil was slipping because of the excavation from the development. As to the alleged damage to the Bowlings' house, Krieger concluded only that "the soil movement poses an immediate danger."

Krieger's affidavit did not establish the absence of a factual dispute on the cause of the damage to the land where the other evidence in the record, when viewed most favorably to the nonmovants, established a genuine issue of material fact. This other evidence was a report issued by H.C. Nutting, the geotechnical-engineering firm for the project. Jessica Kinnard, the geotechnical engineer assigned to the development, authored the report in July 2005 after construction had begun on one house and vegetation had been cleared for others. Kinnard stated that she had observed fresh tension cracks in the Bowlings' slope, as well as evidence of an old landslide in the same area. She was unable to conclude when the fresh tension cracks had occurred because a preconstruction survey of the property had not been performed. Thus, her opinion, when viewed in the light most favorable to the nonmovants, created a genuine issue of material fact as to when the soil had slipped and what had caused the slippage. Krieger had considered Kinnard's report in rendering his opinion, and her report was submitted with his affidavit in support of summary judgment.

The Bowlings also failed to establish the absence of a factual dispute on causation with regard to the alleged damage to their house: Krieger had concluded only that "the soil movement poses an immediate danger to the Bowlings' house." And the other evidence did nothing to augment the case for summary judgment because, as Kinnard had

⁶ Civ.R. 56(C).

noted, there had not been a preconstruction survey of the Bowling property to allow for a comparison of the conditions on the property as the development progressed. Moreover, the record does not contain an affidavit from the Bowlings describing when they had first observed the alleged damage.

We are aware that, in granting summary judgment, the trial court may have acted upon testimony presented at a hearing for a temporary restraining order. But where the testimony was not transcribed and made a part of the record, the court was not entitled to rely upon it.⁷

We reject the Stafford defendants' argument that they had countered Krieger's opinion by submitting a report from the civil engineer for the development on the issue of causation. This engineer, by his own admission, was not competent to render an opinion on the issue. Nonetheless, the record before this court demonstrates that a genuine issue of material fact remains as to the cause of the Bowlings' damages. Moreover, the trial court granted summary judgment without evidence from the Bowlings establishing the culpability and legal responsibility of each defendant. Therefore, we reverse the summary judgment on liability.

The Stafford defendants also challenge the award of damages on several grounds, including that it was not supported by any competent and credible evidence because the trial court failed to hold an evidentiary hearing. We find merit to this argument and reverse the damage award on this basis, without addressing the other purported grounds for reversal.

Finally, the Stafford defendants and the Stafford law firm challenge both the imposition of sanctions and the amount of the sanctions. Although the Bowlings had

⁷ Civ.R. 56(C); *Gessler v. Madigan* (1974), 41 Ohio App.2d 76, 80, 322 N.E.2d 127.

moved for sanctions during the litigation, the record demonstrates that neither the Stafford defendants nor the Stafford law firm was informed that the issue would be addressed at the May 2007 hearing. Moreover, the Bowlings did not present evidence of the fees and costs that they had incurred, nor did they present evidence as to the reasonableness of the fees. Because of this, we are constrained to hold that the sanctions must be reversed.

In light of the foregoing, the remaining assignments of error are moot, and we decline to address them.⁸ Accordingly, the trial court's judgment is reversed, and this cause is remanded for further proceedings in accordance with law.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R.24.

SUNDERMANN, P.J., HILDEBRANDT, and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on September 24, 2008
per order of the Court _____
Presiding Judge

⁸ App.R. 12(A)(1)(c).